III. Incumbent LECs Should Be Required to Apply USF Pass-Throughs in a Non-Discriminatory Manner to All Purchasers of Wholesale DSL, Including Affiliated ISPs

The NPRM (¶ 74) seeks comment on whether broadband Internet access providers "that supply last-mile connectivity over their own facilities" should contribute directly to USF, while recognizing that the USF contribution is owed when carriers supply telecommunications services to ISPs. NPRM ¶ 72. As discussed in Section I, the incumbent LECs' wholesale DSL services are the offerings of "telecommunications service" to affiliated and unaffiliated ISPs. The Commission should clarify, however, that allowing incumbent LECs to charge a USF pass-through to unaffiliated ISPs but not assess such charges to "self-provisioned" DSL for affiliated ISPs would amount to rate discrimination in violation of Section 202(a) of the Act and in violation of the Commission's precedent.[86] Instead, if incumbent LECs decide to pass through USF charges, then affiliated ISPs should be treated no better than an unaffiliated ISP for USF pass-through purposes.

Non-discriminatory USF pass-through is the only implementation of the carrier's pass-through discretion that is consistent with the law, regardless of whether the Commission treats the incumbent LEC as a mandatory or permissive authority contributor under Section 254 of the Act. As discussed above in Section I, the incumbent LEC offering wholesale DSL is a mandatory contributor since it offers "telecommunications service" to unaffiliated and affiliated ISPs. In the context of wholesale DSL, the Commission has held that "[i]ncumbent LECs must base their [USF] contributions on end-user telecommunications revenues," and that "[b]ulk sales

[86] 47 U.S.C. Sec. 202(a); *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd. 8776, ¶ 851 (1997) (if carriers choose to pass-through USF contribution, it shall do so "to all of their customers of interstate services in an equitable and nondiscriminatory fashion.");

of DSL services to Internet Service Providers are included in this requirement."[87] Even if the FCC determines, however, that the incumbent LEC provides only a "telecommunications" input to its affiliated ISP and it is a permissive authority contributor, the pass-through for all similarly situated customers -- ISPs using the incumbent's DSL service as an input -- must be non-discriminatory. Thus, the incumbent LEC must charge its affiliated ISP the same USF pass-through as it charges to unaffiliated ISPs.

While there may be concerns of regulatory parity among *contributors* under a USF regime that assesses charges to DSL but not cable modem service, this is a question of statutory classification of the transmission service,[88] which should not impede the Commission from reaching the question of intramodal discriminatory pass-throughs on the DSL platform. Rather, the USF system and USF goal of maximizing public access to new information services will remain vital so long as carriers actively follow their common carrier duties by offering service without discrimination. Indeed, Internet access providers do not deplete the revenue base of USF; they drive increased usage of telecommunications networks that, in turn, ultimately brings new revenues into the USF system.

---

id., ¶ 829 (if carriers decide to pass-through USF costs, "the carriers may not shift more than an equitable share of their contributions to any customer or group of customers").

[87] *Advanced Services Second R &O*, 14 FCC Rcd. 19237, ¶ 20 n. 44. Further, the FCC has addressed how USF contribution applies to bundled packages of enhanced and telecommunications services. *CPE/Enhanced Services Unbundling Order*, ¶¶ 49-51.

[88] *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, GN Dkt. No. 00-185, CS Dkt. No. 02-52, FCC 02-77 (rel. March 15, 2002). If that decision stands, then the cable operator would be neither a mandatory nor permissive authority contributor under Section 254(d) of the Act. As a result of the Commission' ruling, the Commission's consideration of cable contributions to USF would appear to be just hypothetical at this time.

IV. FCC Title I Regulation of Competitive Providers In the ISP Market Is Not Warranted

While the FCC may have Title I authority to regulate the information services of common carriers, it has clearly established that it need not apply such Title I authority in a generalized manner. The Commission has *not* established, however, whether Title I authority may be extended to reach information services of independent ISPs. Such an extension of regulation would overturn decades-old precedent, supported by both Commission findings and congressional mandate, of keeping independent ISPs free from regulation.

A. The FCC May Regulate Incumbent LECs and Their Affiliates Under Title I, But the FCC Has Never Established Title I Jurisdiction over Independent ISPs

The Commission's Title I authority is limited, and it has not been determined whether and to what extent that authority can reach independent ISPs.[89] Under Title I, the Commission may take only such actions "as may be necessary in the execution of its functions."[90] The extension of its Title I authority must be "reasonably ancillary to the effective performance of [its] various responsibilities."[91] While the *Computer Inquiry* access obligations and safeguards are grounded in Title II jurisdiction,[92] the Commission may have Title I authority, for example, to impose regulations requiring incumbent LECs to provide independent ISPs access to wireline broadband transmission services; this would certainly fall under the Commission's purpose described in Section 1: "to make available, so far as possible, to all the people of the United

---

[89] The Commission did reject the position, however, that exercising Title I jurisdiction over an information service (voicemail and interactive menus) "could lead to the full-scale regulation of entities providing information services, such as Internet Service Providers." *Implementation of Sections 255 and 251(a)(2) of the Communications Act,* Report and Order and Further Notice of Inquiry, 16 FCC Rcd. 6417, ¶ 108 (1999) (*"Disabilities Access Order"*).

[90] 47 U.S.C. § 4(i).

[91] *U.S. v. Southwestern Cable Co.,* 392 U.S. 157, 178, (1968).

States ... a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges."[93] Indeed, in the *Computer Inquiry*, the Commission extended its Title I authority to claim "jurisdiction over the terms and conditions of a common carrier or its affiliate's provision of enhanced services."[94] In so doing, the Commission recognized that it was applying its Title I authority disparately, imposing new requirements not on all providers of the enhanced service, or even on all carriers, but only on selected carriers where the FCC determined that the facts as applied to those carriers made the case for regulation.[95] The Commission thus exercised Title I jurisdiction without imposing "rules of general applicability."[96]

The Commission has explicitly avoided determining whether it can regulate non-carrier information services under Title I. In *Computer II,* the FCC stated, "Cognizant of the serious concerns voiced by several petitioners about the breadth of the *Final Decision's* holding of ancillary jurisdiction over stand-alone CPE, and based on our view that no statutory purpose would be served by regulating non-carrier-provided CPE, ... [w]e do not reach the issue of whether other CPE falls within our jurisdiction under Title I."[97] For the same reason -- lack of statutory nexus -- the Commission cannot impose Title I regulation upon independent ISPs

---

[92] *Computer II*, ¶ 7 (decision reaches services regulated "under traditional Title II concepts").
[93] 47 U.S.C. § 1.
[94] *In the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations,* Memorandum Opinion and Order, 84 F.C.C. 2d 50, 93 (¶ 125) (1980) (*Computer II Reconsideration Order).* Although this extension of Title I jurisdiction was based on a statutory nexus found in Title II of the Act, it did reach enhanced services offered by carrier affiliates.
[95] *In the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations,* Memorandum Opinion and Order on Further Reconsideration, 88 F.C.C. 2d 512, 540 (¶¶ 78-81) (1981) (*Computer II Further Reconsideration Order*).
[96] NPRM, ¶ 61.
[97] *Computer II Reconsideration Order,* ¶ 144.

purely to retain equality of regulation with affiliated ISPs.[98] Likewise, the Commission cannot use its Title I authority to require independent ISPs to provide assistance under CALEA, for example, because there is no independent statutory provision on which to base such an extension of ancillary jurisdiction. The same is true of other items mentioned in the NPRM, including but not limited to requirements in support of the USA PATRIOT Act, protection of CPNI, truth-in-billing obligations, and fraud protections.[99]

B. Regulation of Independent ISPs Would Be Contrary to Both Sound Public Policy and Congressional Mandate

It is undisputed that the ISP market is highly competitive.[100] As a matter of practical and regulatory foresight, the FCC has determined for almost three decades that it should leave enhanced services untouched by FCC regulation.[101] This finding is fully consistent with and indeed required by Congress's pronouncement in Section 230(b) of the Act that "It is the policy of the United States ... (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State

---

[98] NPRM ¶ 61.

[99] In contrast, there was a strong statutory nexus between the Commission's disabilities access rule and Sections 255 and 251(a)(2) of the Act. *Disabilities Access Order*, ¶ 99.

[100] J. Oxman, "The FCC and the Unregulation of the Internet," FCC OPP Working Paper Series, at 17 (July 1999) ("Over 6,000 Internet service providers (ISPs) today offer dial-up service to the Internet, and over 95% of Americans have access to at least four local ISPs.").

[101] *Regulatory and Policy Problems Presented by the Interdependence of Computer & Communications Services and Facilities*, 28 F.C.C. 2d 267 (1971) (*Computer I*) (regarding data processing services). Similarly, in GTE Service Corp. v. FCC, the Court of Appeals for the Second Circuit struck down an FCC effort to extend Title I jurisdiction to data processing services, noting that "while the FCC found a dependence by the data processing industry upon communications facilities, it also found that the computer service industry is one characterized by 'open competition' and 'relatively free entry.' 'These characteristics, in fact, provide[d] a major basis for conclusion that [it]should not, at this point, assert regulatory authority over data processing, as such.'" 474 F. 2d 724, 735 (1973) (citations omitted).

regulation."[102] As a result, the FCC's suggestion that it may be forced by its own "tentative conclusions" to apply Title I regulation to ISPs[103] is contrary not only to the FCC's own findings but also to our national policy as determined by Congress.[104] Accordingly, unless the Commission intends -- against sound policy and congressional mandate -- to take the unprecedented step of extending regulation to ISPs for the first time in history, it should not create a situation where it feels legally compelled to do so.

C. By Forcing Title II Obligations into Title I, the FCC May Increase Regulation in the Name of "Deregulation"

The issue of whether the FCC should regulate ISPs is entirely a creation of the Commission's own tentative conclusion that "the transmission component of retail wireline broadband Internet access service provided over an entity's own facilities is 'telecommunications' and not a 'telecommunications service'"[105] and thus does not fall within Title II of the Act. Although this suggestion is mistaken, as explained in Section I (A)(3) above, it is the sole reason why the Commission is faced with the question of whether its "Title I authority allow[s] [it] to limit such [unbundling] obligations to certain types of providers, such as incumbent LECs, or [whether] the Commission [would] be required to adopt rules of general

---

[102] 47 U.S.C. § 230(b); *see also, USF Report to Congress*, ¶ 45 ("looking at the statute and the legislative history as a whole, we conclude that Congress intended the 1996 Act to maintain the *Computer II* framework.").

[103] NPRM ¶ 61.

[104] 47 U.S.C. § 154(i) ("The Commission may perform any and all acts, make such rules and regulations, and issue such orders, *not inconsistent with this Act* ...") (emphasis added); U.S. v. Southwestern Cable Co., 392 U.S. 157, 181 (1968) ("[T]he Commission has been explicitly authorized to issue 'such orders, not inconsistent with this [Act]...'") (citing 47 U.S.C. § 154(i)); North American Telecommunications Association v. FCC, 772 F.2d 1282, 1292 (7th Cir. 1985) ("Section 4(i) is not infinitely elastic. It could not properly be used to ... contravene another provision of the Act."); Iowa Utils. Bd. v. FCC, 219 F.3d 744, 758 (8th Cir. 2000) ("nothing in 47 U.S.C. §§ 154(i), 201(b), or 303(r) gives the FCC the power to issue regulations contrary to the plain language of the Act.").

applicability under Title I[.]"[106] The Commission would do well to avoid this quagmire of its own making by retaining and improving current regulation of wholesale DSL and advanced services under Title II and not attempting the awkward shoe-horning of core Title II obligations[107] into Title I.

The Commission's tentative conclusion that wholesale DSL should be removed from Title II jurisdiction is particularly remarkable in that it may lead, the FCC suggests, to the extension of Title I regulation to ISPs, including non-facilities-based ISPs that would otherwise have no FCC obligations whatsoever.[108] Such regulatory creep is entirely at odds with the Commission's efforts at deregulation in this proceeding, and is certainly contrary to Section 230 of the Act, as described above. Indeed, it would appear that the only Commission goal to be accomplished under Title I would be to apply regulation onto incumbent LEC DSL services and facilities in order to maintain the *status quo* public interest obligations under CALEA, Section 222 (CPNI), and *Computer Inquiry*.

Whatever resolution the Commission reaches in this matter, it is essential that it not impair ISP access to incumbent LECs' wholesale DSL by reducing regulatory oversight. As described in Section I above, such deregulation would allow incumbent LECs to deny independent ISPs access to their facilities, thus eliminating their ability to compete meaningfully for the vast majority of potential broadband Internet access customers.

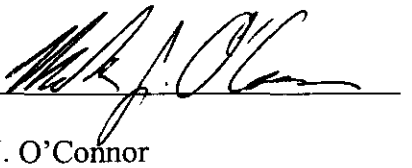
---

[105] NPRM ¶ 17.
[106] NPRM ¶ 61.
[107] *See*, NPRM ¶¶ 54-61 (addressing national security, network reliability, and consumer protection matters, including CALEA, USA PATRIOT Act, NRIC, service discontinuance, CPNI, truth-in-billing, fraud, disabilities access).
[108] NPRM ¶ 61 (requesting comment on whether Title I allows the FCC to regulate ILECs differently).

Conclusion

For the foregoing reasons, EarthLink urges the Commission to continue to encourage intramodal competition among ISPs for broadband Internet services. Ultimately, supporting intramodal competition today will encourage a diversity of broadband applications for the American consumer and provide market-based incentives for the introduction of true broadband intermodal competition.

Respectfully Submitted,

By: 

Dave Baker
Vice President
Law and Public Policy
EarthLink, Inc.
1375 Peachtree Street, Level A
Atlanta, GA 30309
Telephone: 404-815-0770 (ext. 22648)
Facsimile: 404-287-4905

Mark J. O'Connor
Kenneth R. Boley
LAMPERT & O'CONNOR, P.C.
1750 K Street, N.W., Suite 600
Washington, D.C. 20006
Telephone: 202-887-6230
Facsimile: 202-887-6231
Counsel for EarthLink, Inc.

Dated: May 3, 2002

Certificate of Service

I, Elizabeth Diaz, state that copies of the foregoing "Comments of EarthLink, Inc." were delivered by hand or sent by regular mail, this day, May, 3, 2002 to the following:

Marlene H. Dortch
Secretary
Federal Communications Commission
The Portals
TW-A325
445 12th Street, S.W.
Washington, D.C. 20554

Dorothy Attwood
Bureau Chief
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Jeff Carlisle
Sr. Deputy Bureau Chief
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Carol Mattey
Deputy Bureau Chief
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Michelle Carey
Chief, Competition Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Brent Olson
Deputy Chief
Competition Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Katherine Schroder
Chief, Telecommunications Access Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Eric Einhorn
Deputy Chief, Telecommunications Access Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Christopher Libertelli
Special Counsel
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Jessica Rosenworcel
Legal Counsel
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Cathy Carpino
Telecommunications Access Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Paul Garnett
Telecommunications Access Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Diane Law Hsu
Telecommunications Access Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Michael K. Powell
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Marsha J. MacBride
Chief of Staff
Office of Chairman Powell
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Kyle D. Dixon
Legal Advisor
Office of Chairman Powell
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Robert Pepper
Office of Plans and Policy
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Commissioner Kathleen Q. Abernathy
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Matthew Brill
Common Carrier Legal Advisor
Office of Commissioner Abernathy
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Commissioner Michael J. Copps
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

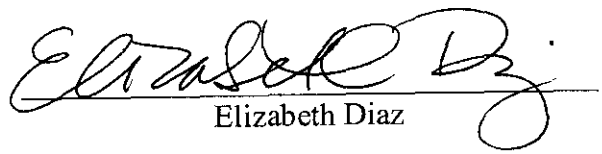
Jordan Goldstein
Sr. Legal Advisor
Office of Commissioner Copps
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Commissioner Kevin J. Martin
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Dan Gonzalez
Sr. Legal Advisor
Office of Commissioner Martin
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Janice Myles
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Qualex International
Portals II
Room CY-B402
445 12th Street, S.W.
Washington, D.C. 20554



Elizabeth Diaz

ATTACHMENT

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of Regulatory Requirements for	)	CC Docket No. 01-337
Incumbent LEC Broadband	)	
Telecommunications Services	)	

REPLY COMMENTS OF EARTHLINK, INC.

Dave Baker
Vice President
Law and Public Policy
EarthLink, Inc.
1375 Peachtree Street, Level A
Atlanta, GA 30309
Telephone: 404-815-0770 (ext. 22648)
Facsimile: 404-287-4905

Mark J. O'Connor
Kenneth R. Boley
LAMPERT & O'CONNOR, P.C.
1750 K Street, N.W., Suite 600
Washington, D.C. 20006
Telephone: 202-887-6230
Facsimile: 202-887-6231
Counsel for EarthLink, Inc.

Date: April 22, 2002

TABLE OF CONTENTS

SUMMARY

The record in this proceeding bears out that a change to nondominant status for incumbent LEC wholesale DSL services would be unjustified and contrary to the public interest. Incumbent LECs have provided no evidentiary support for the contention that they are nondominant in the market for wholesale broadband transport. What evidence is available, however, would strongly indicate that the incumbent LECs are dominant in this market, with market share exceeding 90% and the ability to "price squeeze" competing ISPs.

Equally as important, the current broadband platforms do not allow consumers to exercise competitive choices. While competition across platforms may someday be as seamless as switching from one long-distance carrier to another is today, consumers face higher transactions costs if they attempt to switch from DSL to cable, and so effective consumer choice is limited. Intramodal competition, however, provides consumers with the ability to choose their ISP and Internet services apart from their platform choices (or lack thereof). Dominant carrier regulation, while not perfect, sustains intramodal competition by ensuring reasonable and nondiscriminatory rates, terms and conditions far better than would the business decisions of a deregulated dominant carrier.

Further, EarthLink notes that there appears to be little, if any, public interest benefit flowing from the deregulation of incumbent LEC wholesale DSL services. Incumbent LECs are already free to price and offer retail services—high-speed Internet access—on an unregulated basis. Incumbent LECs have not shown specifically how the tariffing or price cap regulations applied to their existing wholesale DSL services have impeded their ability, in any way, to respond to the market or offer innovative services. Deregulation, however, would expose ISPs to discriminatory treatment or "price squeeze," and thereby undermine the deployment of advanced

services to consumers at "lower prices" and thwart "more expeditious access to innovative, diverse broadband applications," which was a Section 706 goal articulated by the Commission in the *Advanced Services Second Report and Order*.

EarthLink believes that, if the Commission feels compelled to deregulate wholesale DSL, such actions must be measured and must preserve ISP choice for consumers. Therefore, if the Commission permits or mandates detariffing, then the incumbent LEC should be required to web-post its nondiscriminatory terms of wholesale DSL, and to provide adequate prior notice of changes to service terms to existing ISP customers. Similarly, if the Commission decides to take wholesale DSL out of price cap regulation, then the incumbent LEC should first demonstrate that the current rates are cost-based and reasonable and the Commission could then permit rate *reductions* without prior cost justification.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of Regulatory Requirements for	)	CC Docket No. 01-337
Incumbent LEC Broadband	)	
Telecommunications Services	)	

REPLY COMMENTS OF EARTHLINK, INC.

EarthLink, Inc., by its attorneys, files this reply in response to comments filed on the December 20, 2001 Notice of Proposed Rulemaking in the above-captioned proceeding.[1] The comments further demonstrate that incumbent local exchange carriers ("LECs") are dominant providers of wholesale DSL and other advanced services to competing unaffiliated Internet service providers ("ISPs"). Moreover, consumers cannot effectively choose across platforms to select broadband Internet access information services. Under the current market conditions, it is both appropriate and necessary for the Commission to regulate such services under incumbent LEC dominant carrier standards to ensure consumers have the opportunity to access a plethora of Internet service choices.

DISCUSSION

I. Consumer Choice and Diversity of Internet Services Are Best Ensured Through Dominant Carrier Regulation of Incumbent LECs' Wholesale DSL Services

While some incumbent LECs ask not to be deregulated,[2] the larger incumbent LECs urge the Commission to declare them "nondominant" in the provision of wholesale DSL to ISPs. As explained below, EarthLink believes that a change in regulation of the incumbent LECs'

[1] Notice of Proposed Rulemaking, CC Dkt. No. 01-337, FCC 01-360 (rel. Dec. 20, 2001) ("NPRM").

wholesale DSL and related transport (ATM or Frame Relay)[3] is unwarranted at this time, and would undermine consumer choice and the competitive market for high-speed Internet access services.

A. Incumbent LECs Have Failed to Address Their Market Dominance in Wholesale Broadband Transport

The voluminous comments of BellSouth, Qwest, SBC, and Verizon provide scanty discussion or analysis of the wholesale market for broadband transport that these carriers participate in today. Indeed, BellSouth does not even discuss its wholesale DSL market deployment and the federally tariffed service that is the mainstay of its in-region contribution to advanced telecommunication services.

Yet, incumbents have provided DSL services to affiliated and unaffiliated ISPs for years. The wholesale market for these services is actual, and not theoretical. The incumbent LECs' federal access tariffs[4] attest to the fact that advanced telecommunications services for the incumbent LECs are the wholesale DSL services provisioned to affiliated and unaffiliated ISPs. Indeed, especially when addressing Wall Street, the incumbent LECs emphasize that their broadband business is DSL Internet access service.[5]

---

[2] *See*, Comments of Chouteau Telephone Co., et al., at 18-20; Comments of National Telecommunications Cooperative Association at 5-6.

[3] ISP customers of the incumbent LEC's wholesale DSL typically must also purchase the incumbent LEC's aggregation service, such as ATM or Frame Relay. See, e.g., SBC Advanced Solutions, Inc. Tariff F.C.C. No. 1, § 6.2.7 (wholesale DSL customer "must have connectivity to Company's ATM network"). As shown by commenters, the incumbent LECs face insufficient competition in these traditional business markets, and have too much control over special access facilities, to be reclassified as non-dominant providers. Comments of WorldCom at 22-25 (March 1, 2002); Comments of AT&T Corp at 19-36 (March 1, 2002).

[4] SBC Advanced Solutions Inc., Tariff F.C.C. No.1, § 6 ("Wholesale Digital Subscriber Line Transport"); Qwest Corp., Tariff F.C.C. No.1, § 8.44; BellSouth Tariff F.C.C. No.1, § 7.2.17; Verizon Telephone, Tariff F.C.C. No.20, § 5.2.4 ("Verizon Infospeed DSL Solutions, Volume and Term Discount Plan").

[5] *See, e.g.*, SBC Investor Briefing at 5 (Jan. 24, 2002) ("*SBC Investor Briefing*")("Broadband and DSL Internet"), *found at*, http://www.sbc.com/investor_relations/company_reports_and_sec_filings/

While this proceeding considers deregulation of their wholesale DSL services, the incumbent LEC commenters have failed to provide any relevant data to support the contention that they lack market power over these telecommunications services. For example, the incumbent LEC commenters do not provide an analysis of the percentage of market share of their wholesale services or of the level of competition in the wholesale market. The analysis previously submitted by SBC's economists, however, states that SBC provides 95% of the residential ADSL in its in-region markets.[6] Further, the FCC's data demonstrate that incumbent LECs provide 93% of the wholesale DSL in the U.S.[7] Such a high market share over this telecommunications service is convincing evidence of "dominant carrier" status in the marketplace, as the Commission has found on several occasions. For example, the Commission rejected AT&T's request to be reclassified as non-dominant when it was found that AT&T held over 80% of the local access facilities in 1980 and it held 90% of the long-distance market in 1984.[8] Likewise, in 1997, when the Bell Operating Companies had 99 percent of the in-region local exchange and exchange access market (as measured by revenues), the Commission held that the "BOCs currently possess market power" for those services, despite some signs of local competition.[9]

0,5931,93,00.html; "Qwest Communications Reports Fourth Quarter, Year-End 2001 Results (Jan. 29, 2002) (In discussing DSL services, Qwest states that it "continues to leverage its infrastructure by offering broadband services for fast Internet connections"), found at, http://www.qwest.com/about/investor/financial/index.html.

[6] SBC Petition for Expedited Ruling, Declaration of Robert Crandall and J. Gregory Sidak, ¶ 55 (October 3, 2001) ("we estimated SBC's market share by multiplying the total ADSL market share in its region by 95 percent.") (*"Crandall/Sidak"*).

[7] *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans*, Third Report, 17 FCC Rcd. 2844, ¶ 51 (2002) (*"Third Report"*).

[8] *See, In the Matter of Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd. 3271, ¶¶ 6, 67 (1995) (*"AT&T Reclassification Order"*).

[9] *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area*, Second Report and Order, 12 FCC Rcd. 15756, ¶ 100 (1997) (*"LEC Classification Order"*).

Compared with the level of intermodal and intramodal competition that the Commission found in the *AT&T Reclassification Order*, the current wholesale market for broadband transport is wholly lacking of robust competitive options apart from the incumbent LEC. Thus, while the Commission found that AT&T "face[d] at least two full-fledged facilities-based competitors" with "national networks that are capable of offering most consumers an alternative choice of services," and it faced another national facilities-based competitor (WorldCom) in the business market, as well as "several hundred small carriers that primarily resell the capacity" of the larger carriers,[10] none of these hallmarks of a competition are present in the wholesale broadband market today.

Moreover, the incumbent LEC commenters fail to address the potential for "price squeeze" or other anticompetitive behavior given that the provide the DSL input necessary for unaffiliated ISPs to offer service and they compete vigorously at the same time in the retail Internet access market. Instead, the incumbents merely argue that "price squeeze" potential does not exist against intermodal competitors, like cable modem operators, because those providers do not use the incumbent LEC network, but the incumbents do not address their ability to engage in a "price squeeze" against intramodal competitors such as unaffiliated ISPs using the wholesale DSL services.[11] Indeed, concerns about and allegations of incumbent LEC "price squeeze" using DSL rates have already arisen at the FCC, and the FCC has assured the public that it would take such issues seriously.[12] The incumbent LEC commenters, however, do not take the predatory

---

[10] *AT&T Reclassification Order*, 11 FCC Rcd. 3271, ¶ 70.
[11] *See, e.g.*, Comments of SBC Communications Inc. at 51-52 (March 1, 2002).
[12] *See, e.g.*, Letter of EarthLink, Inc., Competitive Telecommunications Association, U.S. Internet Service Providers Alliance, and Virginia ISP Alliance to Chairman Michael Powell, Federal Communications Commission (filed Sep. 17, 2001) (objecting to numerous provisions of SBC-ASI Tariff FCC No. 1); *In the Matter of GTE Telephone Operating Co.s,* Memorandum Opinion and Order, 13 FCC Rcd. 22466 (1998), ¶32 (1998) (FCC is "well-versed in addressing

pricing matter raised in the NPRM (¶29) seriously, by failing to address how their ability to engage in "price squeeze" would be constrained in the absence of regulation.

The incumbent LEC commenters offer two ultimately unavailing explanations for avoiding an analysis of their market power in the wholesale broadband transport market. First, they assert that the status of competition in the wholesale market is unimportant, because "the pricing of transport is constrained by the price-elasticity of demand for DSL service."[13] However, it is a gross oversimplification to apply those general economic theories to today's broadband market. In fact, WorldCom has submitted economic expertise strongly indicating that, even in those local markets where broadband access is available via cable and DSL, "duopoly is much more likely to lead to monopoly behavior."[14]

Second, in urging the Commission to reject a wholesale market, Qwest incorrectly asserts "broadband services purchased on a wholesale basis typically consist of precisely the same broadband services that consumers purchase, albeit at larger volumes . . . ."[15] Nothing could be further from the truth. As the Commission noted in the *Advanced Services Second R&O*, "advanced services sold to Internet Service Providers under volume and term discount plans described above *are inherently and substantially different* from advanced services made available directly to business and residential end-users."[16] The wholesale broadband transport

---

price-squeeze concerns" and will "address price squeeze concerns" regarding incumbent LEC DSL).

[13] *Crandall/Sidak*, n. 51, *attached to*, Comments of SBC Communications, Inc.

[14] Declaration of Daniel Kelley, HAI Consulting, Inc. at 12, *attached to*, Comments of WorldCom, Inc. (March 1, 2002).

[15] Comments of Qwest Communications International, Inc. at 21 (March 1, 2002).

[16] *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability,* Second Report and Order, 14 FCC Rcd. 19237, ¶ 8 (1999) (*"Advanced Services Second R&O"*) (emphasis added). *See also*, id., ¶ 14 (the ISP "adds value to the bulk DSL by dividing that service for individual consumer use and adding Internet service"), ¶ 15 (Under the former Bell Atlantic bulk DSL tariff, the ISP provides a variety of services to the end-user, such as the ISP "must provision all CPE and wiring to its end-users, provide customer service directly

services are also logically distinct from the retail Internet access purchased by consumers. While wholesale DSL is a transport connection from the customer to the incumbent's central office, retail high-speed Internet access offers a much different set of services and capabilities to the end-user. Indeed, Qwest recently argued just the opposite of what it asserts here to the Commission, asserting that DSL service is not the equivalent of retail Internet access service, and that "ISPs combine[] Qwest's DSL service with its Internet access services in order to produce a bundled information service that can be provided to end-users customers," which is "a new information service."[17]

Moreover, while Qwest claims that other facilities-based transport providers could theoretically provide wholesale transport,[18] the only relevant matter is whether such transport is, in fact, available or likely and imminent.[19] As EarthLink and other commenters have pointed out, the *theoretical* possibility of alternative open platforms sometime in the future (e.g., terrestrial wireless) and the *limited* access in the cable industry do not somehow manifest into effective competition in today's market with the incumbent LECs for the wholesale provision of high-speed transport. Current FCC data also confirm that alternative platforms such as terrestrial and satellite wireless supply a relatively miniscule number of high-speed transport arrangements relative to the incumbent LECs,[20] and so these alternatives cannot impose competitive pressure

---

to end-users, and assume sole responsibility for marketing, ordering, installation, maintenance, repair, billing and collections").

[17] Qwest Petition for Declaratory Ruling, WC Dkt. 02-77, Affidavit of Vice President Steven K. Starliper, ¶¶ 7, 5 (filed April 3, 2002).

[18] Comments of Qwest Communications International, Inc. at 21 (March 1, 2002).

[19] *See*, U.S Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines, §§ 1.31 and 1.32 (1997) (firms in relevant market includes those that currently produce or sell in the market as well as firms not currently producing or selling if such firms' participation is "likely to occur within one year and without the expenditure of significant sunk costs of entry and exit").

[20] *Third Report*, n.127 (As of June 2001, there were a total of 200,000 terrestrial and satellite wireless high-speed access arrangements).

on the incumbent LECs' current dominance in the wholesale transport market. Finally, the April 17, 2002 announcement of a strategic marketing alliance between SBC and Echostar would suggest head-to-head platform competition between these two platform owners might not actually emerge after all.[21]

B. Incumbents' Competitive Analysis Fails to Address the Communities Not Served by Multiple Providers and Whether Oligopoly Yields Competitive Market for Consumers.

The geographic market that under review should be the local market. If consumers or businesses cannot avail themselves of competitive broadband services, it is of little significance that another community, neighboring or not, may have competitive alternatives. The incumbent LECs' arguments for a large geographic scope of the broadband market –such as regional or even national – fail to assess the matter from the consumer's perspective.[22] Rather, the incumbent LECs appear to advocate for such a wide geographic scope in defining the market because it results in the most favorable possible assessment for them.

However, when one looks at the local markets for signs of broadband competition, it is only spotty at best at this time. In terms of intermodal competition, some homes in some communities are fortunate to have two choices; the *Third Report* finds, however, that Americans living in 59.2% of zip code areas in the U.S. have two or fewer high-speed providers, and in 42.5% of U.S. zip codes there are one or no providers.[23] Further, in many cities and communities the incumbent telephone company's wholesale service is the wholesale service of

---

[21] "SBC, Echostar Announce Strategic Marketing Alliance," SBC Press Room (April 17, 2002), found at, www.sbc.com/press_room/1,5932,31,00.html?query=20020417-1.
[22] *See, e.g.*, Comments of SBC Communications Inc. at 32 (March 1, 2002) (relevant geographic market is "the nation as a whole").
[23] *Third Report*, Appendix C, Table 9.

last resort because it is the *only one* available.[24] Anecdotal evidence in the record confirms that, for many communities, no choice means the incumbent LEC faces no competitive constraints whatsoever. For example, one commenter pointed out that in "Oakland, CA, a city of about 350,000 . . . SBC is the only game in town. There is no cable Internet. There is almost no wireless Internet. All DSL lines run on PacBell (SBC) copper."[25] Further, as explained by the New Mexico ISP association, "only Qwest offers New Mexico ISPs the opportunity to provide Internet access to residential customers with a broadband connection."[26]

Moreover, even for those consumers that have an initial choice between DSL and cable platforms, the current vitality of cross-platform competition is questionable, at best. As pointed out by WorldCom, economic models indicate that two competitors in such a market would tend toward oligopoly pricing closer to monopoly behavior, and not toward open and aggressive competition.[27] Further, with the current technology and market conditions facing consumers, there is little indication that consumers can, as a practical matter, actually choose a different platform response to price or service offering changes between the platform providers. For example, the consumer faces serious impediments to switching from one platform to another in reaction to price changes, including incumbent LEC "lock-in" contracts of bundled Internet access and DSL, the consumer's purchase of CPE (i.e., modems) that is specific to either DSL or cable, the installation costs, hassles and delay associated with switching between DSL or cable services, and the inherent differences of the platforms (such as security and privacy distinctions

---

[24] As pointed out by DIRECTV Broadband, "[o]nly 1/3 of American homes can currently choose between wireline and cable broadband services. That means 2/3 of homes are stuck with monopoly access, if they have access at all." Comments of DIRECTV Broadband, Inc. at 6 (March 1, 2002).
[25] Comments of David M. Sharnoff (March 1, 2002).
[26] Comments of New Mexico Internet Professionals Association at 3 (March 1, 2002).
[27] Comments of WorldCom at 13, and Attachment A, Declaration of Daniel Kelly, HAI Consulting, Inc. at 12-14.

and technical qualities (i.e., use of the cable shared medium or the DSL warranty of minimum sync rate).

While the incumbent LEC commenters claim that cable operators are their competitors, they have offered no substantive evidence of "demand elasticity" to counter these obvious consumer impediments to cross-platform competition, such as actual churn rates between platforms or promotions addressing customer issues of switching platforms.[28] This lack of robust competition between the two broadband platforms is in contrast to the consumer experience with facilities-based long-distance carriers, where the consumer faces low transactions costs for switching from one long-distance carrier to another and so the carriers must constantly react to competitive pressures with beneficial results for consumers, such as lower prices and innovative marketing plans. The current state of broadband competition is, therefore, unlike the high "demand elasticity" that the Commission found in reclassifying AT&T as a non-dominant carrier, where the FCC's record showed that "residential consumers are highly demand-elastic and will switch to or from AT&T in order to obtain price reductions and desired features."[29] Indeed, while the *AT&T Reclassification Order* noted that "virtually all customers, including resellers, have numerous choices of equal access carriers" due to the implementation of "equal access" for competitors on the LEC voice telephony network,[30] there is today no ability

---

[28] SBC's claims of high-churn are, in fact, not evidence of churn across platforms at all. While *Crandall/Sidak* asserts that SBC's DSL experiences a high "churn" rate, it offers no evidence whether the "churn" represents customers switching from DSL to cable or customers are just dropping DSL entirely and not switching to cable. *Crandall/Sidak*, ¶ 68. Similarly, while Qwest claims that "consumers can simply react to above-market prices by switching carriers," it fails to explain how consumers on a DSL service can avoid the significant transaction costs associated with such a cross-platform switch. *See* Comments of Qwest Communications International at 58.

[29] *AT&T Reclassification Order*, 11 FCC Rcd. 3271, ¶ 63.

[30] *AT&T Reclassification Order*, 11 FCC Rcd. 3271, ¶ 72. *See also LEC Classification Order*, 12 FCC Rcd. 15756, ¶ 97 ("[T]he Commission also recently found that the purchasing decisions of most customers of domestic interexchange services are sensitive to changes in price, and

for consumers to effectuate a competitive choice and migrate on an "equal access" basis from DSL to cable broadband platforms.

While EarthLink would agree with the free-market observation of the esteemed Alfred Kahn that "[i]n a competitive market, with multiple platforms available for providing service" the ISP-carrier relationship should be governed by mutually agreed contractual terms,[31] it is equally true that today's market does not reflect multiple platforms available for consumers or ISPs. Instead, the vast majority of cable consumers are served by cable systems that offer no ISP access, and incumbent LECs continue to this day to clutch the fruits of their government-sponsored monopoly and resist DLEC competition, by holding onto key elements of DSL service – including loops, interoffice transport, and collocation space in central offices. Until such time as robust intermodal competition develops, the dominant carrier regulations at issue in this proceeding, including critical *Computer II/III* tariffing and access safeguards, serve a vital public interest by allowing consumers to benefit from intramodal competition by choosing among competing ISPs.

II. Incumbent LECs Have Failed to Address the Public Interest

Forbearance under Section 10 of the Act requires a showing that elimination of regulation is "in the public interest" and that it would not be "necessary for the protection of consumers,"[32]

---

customers would be willing to shift their traffic to an interexchange carrier's rival if the carrier raises its prices. The existence of such demand substitutability supports the conclusion that the BOC interLATA affiliates will not have the ability to raise prices by restricting their output.").

[31] Declaration of A.E. Kahn and T.J. Tardiff at 24 ("Kahn Decl."), attached to Comments of Verizon ("In a competitive market, with multiple platforms available for providing service, if one provider withholds its cooperation from independent ISPs in the hope of vertically extending its control from transport to content, the ISPs can work with rivals, who will thereby gain a competitive advantage.").

[32] 47 U.S.C. § 160(a)(2)&(3).

yet the incumbent LEC commenters have failed to show how elimination of dominant carrier regulation would meet these statutory standards.[33]

For example, the incumbent LECs fail to show how eliminating the tariffing and pricing regulations for wholesale DSL services to the ISP market would help consumers to obtain DSL services more quickly or easily, or how such FCC action would spark consumer demand or investment in new broadband-capable information services. Indeed, as EarthLink has argued, the elimination of regulations designed to provide reasonable and nondiscriminatory access to competing ISPs, such as the tariffing obligations, would actually harm consumers. An FCC action to deregulate also increases risk for application developers and information providers, because access to customers then becomes more tenuous and subject to incumbent LEC demands, reasonable or not. This, in turn, limits investment in new and possible "killer" applications.[34] As the FCC noted in the *Advanced Services Second R&O*, the advanced services

---

[33] Moreover, as EarthLink noted in its comments, since the Commission does not consider cable modem service to include a telecommunications service, it is misguided for the incumbent LEC commenters to focus on competition from cable modem service as a means of meeting the forbearance standard under Section 10 of the Act. Section 10(b) provides that the Commission should consider whether forbearance "will enhance competition among *providers of telecommunications services*; " and a determination of forbearance "in the public interest" follows when the Commission finds that forbearance "will promote competition among *providers of telecommunications services*." 47 U.S.C. § 160(b) (emphasis added). Surely, the Commission cannot both find that cable modem service is competitive with DSL service for Section 10 purposes, and yet also hold that cable modem service does not and should not include a "telecommunications service."

[34] Somewhat ironically, Alfred Kahn, writing on behalf of Verizon, explains how regulatory decision making can have deleterious effects on the balance of risks of the private companies affected: "by increasing the costs of only one type of competitor – in effect imposing a tax on particular sources of supply – it makes it less likely that the services of those competitors are uniquely qualified to offer will make it to the market, depriving consumers of the possibly enormous benefits of such offerings." Comments of Verizon, Kahn Decl., at 12. For unaffiliated ISPs and application providers, the risk of loss of effective access via the incumbent LEC DSL platform, due to a regulatory change, can have devastating effects on the incentive to spend capital and bring new information services to the American consumer. It is especially deleterious where, as here, the ISPs and other unaffiliated information providers had relied for years on those Commission rights of access.

deployment goals of the 1996 Act are facilitated when incumbent LECs offer DSL to ISPs "at the lowest possible price" so that "*consumers ultimately benefit through lower prices and greater and more expeditious access to innovative, diverse broadband applications by multiple providers of advanced services.*"[35] Further, in the absence of regulation, incumbent LECs have every incentive to raise rates of rival ISPs or otherwise to discriminate against unaffiliated ISPs, because the incumbents actively compete against ISPs through their affiliates, such as Prodigy, BellSouth.net, and Verizon.net. The regulatory oversight and remedies of dominant carrier regulation, however, provide a greater degree of nondiscrimination and reasonable conduct so that competing ISPs may also offer choices of information services to consumers.

The public interest goals of Section 706 of the 1996 Act further underscore the need for the regulation of incumbent LECs' DSL services to ensure efficient and reasonable broadband transport to all ISPs. As the Commission explained to the D.C. Circuit in defending the *Advanced Services Second R&O*, the incumbent LECs' sale of volume-based DSL services to ISPs, "in turn, would allow ISPs to package affordable DSL-based-Internet services to residential and business end-users, and advance the goal of Section 706 to encourage deployment of advanced telecommunications capability to all Americans."[36] Section 706 goals cannot be furthered, however, if incumbent LECs are afforded more opportunity to foreclose ISP competitors from reasonable access to the DSL.

Moreover, unlike other cases of "nondominant" reclassification, the forbearance under consideration here would be far more radical, essentially creating a void of law for

---

[35] *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Second Report and Order, 14 FCC Rcd. 19237, ¶ 20 (1999) ("*Advanced Services Second R&O*") (emphasis added).

[36] Brief of the Federal Communications Commission, D.C. Cir. Case No. 00-1144, at 9 (filed Dec. 22, 2000) (FCC's brief in support of the appeal of the *Advanced Services Second R&O*);

discriminatory activity. For example, in the *LEC Classification Order*, the Commission found that classifying BOCs as "nondominant" in the provision of long-distance services would be in the public interest because Section 272 safeguards, as well as the FCC's implementing regulations and specific enforcement provisions, would remain in effect to deter discriminatory activity by the BOCs.[37] Similarly, in the *AT&T Reclassification Order*, the Commission noted that the implementation of "equal access" in almost all incumbent LEC switches made it highly unlikely that discrimination would prevail or impede consumer choice of long-distance carriers.[38] In this case, however, no other FCC regulation would otherwise curb incumbent LEC discriminatory conduct against competing ISPs. Rather, the ISP's only avenue for recourse would be to engage in lengthy litigation to enforce general common carriage law (under Section 201 and 202 of the Act), requiring the agency to engage in novel and difficult interpretation in the enforcement process. At best, this process is extremely time-consuming and resource-intensive and ignores the practical need to redress anticompetitive conduct when it happens, not years later, especially given this fast-changing market. Thus, as a practical matter, forbearance would provide few, if any, ISPs with any alternative regulatory process or protections.

Further, the carrier regulations in question here apply only to the incumbent LECs' wholesale advanced telecommunications services to ISPs, and so it is speculative, at best, to conclude that deregulation here would have a positive effect on the incumbent LECs' retail services to consumers. These tariffing and pricing rules do not regulate, and certainly do not impede, the flexibility of the incumbent LECs to change its retail Internet access offerings, to offer different Internet services, or to price those retail offerings differently. While the

---

See also *Advanced Services Second R&O*, 14 FCC Rcd. 19237 ¶¶ 1, 3, 20 (encouraging efficient and low-price DSL services to ISPs advances the public interest goals of Section 706 of the Act).

[37] *LEC Classification Order*, 12 FCC Rcd. 15756, ¶¶ 110-116.

[38] *AT&T Reclassification Order*, 11 FCC Rcd. 3271, ¶ 71.

2incumbent LEC commenters act as if regulation applies to their retail operations,[39] it is plain under *Computer II/III* that no FCC regulation applies to their Internet access services. Today, ILECs compete and have the ability to offer an endless number of information services on an unregulated basis. Verizon, for example, can today "experiment" with "revenue generated," "clicks" or "eyeballs" pricing as much as it pleases.[40] As the incumbent LECs well know, the FCC's regulations here concern only the bottleneck telecommunications services. Therefore, it is questionable how the forbearance from such regulation would positively impact retail rates and services to consumers at all.

Indeed, the incumbent LECs have made only half-hearted claims that the current regulatory scheme hampers their ability to offer retail services. BellSouth, for example, provides not a single example of how the current regulation of their wholesale DSL services impedes its ability to offer flexible retail Internet access in response to the market and consumer needs.[41] Similarly, while SBC complains that *Computer Inquiry* obligations somehow restrict its ability to offer packetized data services because some protocol conversion is treated as an information service,[42] the Commission has been quite clear on what is "enhanced" protocol conversion subject to *Computer II* unbundling.[43] Moreover, far from being onerous, the *Computer II*

---

[39] *See, e.g.*, Comments of Verizon at 43 (March 1, 2002) (Verizon states that deregulation would allow it to "experiment[] with new pricing methods for broadband that are already being used by their cable and Internet competitors – for example, rates based on a percentage of the customer's revenue generated using their service, or on the number of clicks or 'eyeballs' delivered to a particular customer.").

[40] *See, e.g.*, Comments of Verizon at 43.

[41] See Comments of BellSouth Corporation at 50-53 (while BellSouth asserts that forbearance will promote competition, it does not explain how consumers would benefit and it fails to explain how the current regulations constrain BellSouth's consumer market operations).

[42] Comments of SBC Communications Inc. at 62.

[43] *See, e.g., In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272, Order on Reconsideration*, Order on Reconsideration, 12 FCC Rcd. 2297, ¶ 2 (1997) (explaining that certain protocol processing services that are deemed to be telecommunications services).

obligation merely reinforces the basic common carrier duty for carriers to offer service on a nondiscriminatory basis under tariff. SBC provides no explanation of how, after many years, this is now too burdensome or how it interferes with the introduction of new services.

III. The Commission Should Take Actions to Better Ensure ISP Choice

As EarthLink will discuss in the Commission's companion proceeding, [44] there are several changes the Commission could make to improve on *Computer II/III* safeguards to make ISP choice more effective and to enhance the public value of FCC regulation. EarthLink does note here, however, that some ILECs have criticized *Computer II/III*. The FCC should properly articulate common carriage obligations appropriate in the advanced services setting, but not deny consumer choice.

EarthLink is open to the concept of reforming some regulation of dominant carrier regulation of DSL services, especially to ensure it is effective, so long as the Commission recognizes that incumbent LECs are dominant in the provision of wholesale DSL to ISPs and, as a result, regulatory reform must include safeguards to ensure ISPs have nondiscriminatory access to telecommunications services.

If de-tariffing of DSL services is to be seriously considered, then the reform regulation must also recognize that ISPs require information, in advance, concerning changes to the rates and terms of the telecommunications services. A decision to forbear or modify tariff requirements due to the possible time or regulatory burdens imposed should also recognize that incumbent LECs must proffer new ways of informing ISP customers in a reasonable and straightforward manner of service changes. For example, many incumbent LECs already provide the terms and conditions of service on their Internet sites for telecommunications

services and, so long as they are obliged to keep the information accurate and accessible to all, this could also inform ISPs of the terms of DSL service offerings. In addition to web-posting, incumbent LECs should send to each current ISP-customer's designated e-mail address a complete description of any changes to terms of service or rate provisions proposed, with a reasonable advance time prior to such changes (e.g., 15 days).

Moreover, de-tariffing should not be used to facilitate discriminatory service provisioning. The Commission should establish that incumbent LECs must offer reasonable service terms and rates to all ISPs. Further, EarthLink does not agree with BellSouth's position that incumbent LECs should be permitted to enter into contract tariffs.[45] While BellSouth is certainly free to modify its tariff or the terms of service under a de-tariffed setting to address better customer concerns, as suggested above, there would appear to be no valid reason for exclusive contracts with ISPs that vary from available terms of service. Rather, contract-based arrangements between a dominant carrier and its affiliated ISPs would raise serious concerns of preferential treatment in the provisioning of telecommunications services.

Further, some incumbent LECs have argued for forbearance from price cap regulation on advanced services, arguing generally that without such regulations the incumbents will be able to "satisfy consumer demand faster and at lower rates by reducing the costs and delay of a carrier introducing new services."[46] It should be noted, as discussed above, the *consumer* advanced services of BellSouth and other incumbents are Internet access services; rates of such services are wholly unregulated, and the incumbents are free to modify those rates at any time without any regulatory constraint. To the extent that the *wholesale* DSL services are subject to price

---

[44] *In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Notice of Proposed Rulemaking, CC Dkt. No. 02-33, FCC 02-42, ¶¶ 43-52 (Feb. 15, 2002).

[45] Comments of BellSouth at 53.

regulation, EarthLink believes there are reasonable regulatory responses that would reflect the carrier's dominant status and its ability to unreasonably raise rates. EarthLink notes that incumbents are in a unique position to engage in a "price squeeze" against unaffiliated ISPs, due to the fact that they are the dominant providers of the wholesale input (DSL) to unaffiliated ISPs and they are also a major provider of retail ISP services. Thus, incumbents can both raise rival ISPs' costs while they keep retail prices low, effectuating a "price squeeze" on all other ISPs. While the affiliated ISP may suffer paper losses, the incumbent LEC, or its parent, does not since its economic costs of providing DSL services do not change, even as it raises costs of ISP rivals.

The Commission, of course, could develop other forms of rate regulation to meet better incumbent LECs' needs as well as predatory pricing concerns. For example, the Commission could allow incumbent LECs to avoid price cap regulation of DSL by establishing a public proceeding to review whether the incumbent's current rates are cost-based and reasonable. If current rates were found to be cost-based and reasonable, then the incumbent would be free to establish lower DSL rates to meet competition without price cap constraints.[47] Subsequent rate increases or other pricing actions could be subject to the same public interest review.

Conclusion

Regulatory changes to incumbent LECs' wholesale DSL obligations will not spur deployment, and likely will harm the incentives and ability for information providers to deliver broadband applications to the American consumer. Further, forbearance from regulation of such wholesale DSL service has not been shown to have any logical benefit for the American

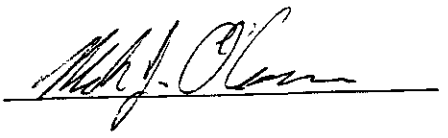
---

[46] Id., at 50.

[47] SBC has noted that its costs of providing DSL service continue to fall. In its January 24, 2002 Investor Briefing, SBC noted that its DSL operations were experiencing a "strengthened cost profile" and that "[s]ince the beginning of 2001, SBC's recurring revenues per DSL Internet subscriber are up 30 percent, and total acquisition costs per gross add are down more than 35

consumer. Therefore, EarthLink urges the Commission to retain the current regulatory scheme of dominant carrier regulation of incumbent LECs' wholesale DSL services, as well as related ATM and Frame Relay services, used by ISPs throughout the country to deliver high-speed Internet access to the American consumer.

Respectfully Submitted,

By: 

Mark J. O'Connor
Kenneth R. Boley
LAMPERT & O'CONNOR, P.C.
1750 K Street, N.W., Suite 600
Washington, D.C. 20006
Telephone: 202-887-6230
Facsimile: 202-887-6231
Counsel for EarthLink, Inc.

Dave Baker
Vice President
Law and Public Policy
EarthLink, Inc.
1375 Peachtree Street, Level A
Atlanta, GA 30309
Telephone: 404-815-0770 (ext. 22648)
Facsimile: 404-287-4905

Date: April 22, 2002

---

percent." *SBC Investor Briefing* at 5. Thus, as competition is introduced in the market, rates should fall and not rise.

Certificate of Service

I, Elizabeth Diaz, state that copies of the foregoing "Reply Comments of EarthLink, Inc." were delivered by hand or sent by regular mail, this day, April 22, 2002, to the following:

Marlene H. Dortch
Secretary
Federal Communications Commission
The Portals
TW-A325
445 12th Street, S.W.
Washington, D.C. 20554

Sharon J. Devine
Qwest Corporation
1801 California Street
49th Floor
Denver, CO 80202

Evan Leo
Kellog Huber Hanson Todd & Evans, PLLC
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036

Dorothy Attwood
Bureau Chief
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Jeff Carlisle
Sr. Deputy Bureau Chief
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Carol Mattey
Deputy Bureau Chief
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Michelle Carey
Chief, Competition Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Brent Olson
Deputy Chief
Competition Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Katherine Schroder
Chief, Telecommunications Access Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Eric Einhorn
Deputy Chief, Telecommunications Access Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Christopher Libertelli
Special Counsel
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Jessica Rosenworcel
Legal Counsel
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Cathy Carpino
Telecommunications Access Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Paul Garnett
Telecommunications Access Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Diane Law Hsu
Telecommunications Access Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Michael K. Powell
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Marsha J. MacBride
Chief of Staff
Office of Chairman Powell
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Kyle D. Dixon
Legal Advisor
Office of Chairman Powell
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Robert Pepper
Office of Plans and Policy
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Commissioner Kathleen Q. Abernathy
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Matthew Brill
Common Carrier Legal Advisor
Office of Commissioner Abernathy
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Commissioner Michael J. Copps
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Jordan Goldstein
Sr. Legal Advisor
Office of Commissioner Copps
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Commissioner Kevin J. Martin
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Dan Gonzalez
Sr. Legal Advisor
Office of Commissioner Martin
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Janice Myles
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Qualex International
Portals II
Room CY-B402
445 12th Street, S.W.
Washington, D.C. 20554

Elizabeth Diaz